

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

NO. 76-4076

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NAZARETH REGIONAL HIGH SCHOOL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**PETITION FOR REHEARING, AND SUGGESTION FOR
REHEARING IN BANC, ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD**

JOHN D. BURGOYNE,
Assistant General Counsel,

PATRICK J. SZYMANSKI,
Attorney,

*National Labor Relations Board.
Washington, D. C. 20570*

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

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Under Rules 35 and 40 of the Federal Rules of Appellate Procedure, the National Labor Relations Board respectfully petitions the Court for rehearing, and suggests rehearing in banc, with respect to that part of the panel's decision (Judges Moore, Anderson, and Feinberg) filed February 28, 1977, that denies enforcement of the Board's order directing petitioner Nazareth Regional High School to grant restitution of any wages or benefits lost because of unilateral imposition of contract terms. The panel's opinion is contrary to the decision of the United States Supreme Court in N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272 (1972), the decision of the Sixth Circuit in Spitzer Akron v. N.L.R.B., 540 F. 2d 841 (C.A. 6, 1976), and the consistent position of the Board.

1. In December 1973 the Henry M. Hald High School Association announced that effective September 1, 1974, it would transfer ownership, operation, and control of one of its member schools, Nazareth Diocesan High School, to an independent board of trustees incorporated as Nazareth Regional High School. The lay teachers then employed at Nazareth were represented by the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (the Union), and had a collective bargaining agreement effective through August 31, 1974. On March 25, 1974, the new board indicated its intention to hire all the Nazareth lay faculty. In April, however, the board offered to hire the Nazareth teachers only upon terms and conditions different from those currently established.

The panel held that because the new administration had never committed itself to offering employment terms identical to those in effect before September 1, it was not until the faculty were actually hired and commenced work on September 1 that it was clear that a majority had been represented by the Union. Until that date, concluded the panel, Nazareth had no duty to bargain with the Union and was free unilaterally to set initial terms of employment.

2. In N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272, 294 (1972), the Supreme Court found that a successor-employer's duty to bargain with the union that represented the predecessor's

employees will not ordinarily arise until it has hired its full complement of employees because it is usually only then that it becomes clear that a majority of the successor's employees were employed by the predecessor and were therefore represented by the union. The Court went on to hold, however, that in some cases it will be "perfectly clear" before employment begins "that the new employer plans to retain all of the employees in the unit." Under these circumstances "it will be appropriate to have [the successor] initially consult with the employees' bargaining representative before he fixes terms." Id. at 294-95.

The Court's meaning, we submit, is plain. The successor's duty to bargain arises as soon as it becomes clear that a majority of the successor's work force will be drawn from the predecessor's, whether that point coincides with or precedes actual employment with the successor. Once the duty to bargain arises, the employer cannot alter wages, hours, or working conditions without giving the union the opportunity to bargain.

3. The Board ruled in Spruce Up Corp., 209 NLRB 194 (1974), that a successor employer's intent to retain all of the predecessor's employees is not "perfectly clear" when the successor declares its intent to hire a majority of the predecessor's employees and at the same time offers continued employment only on different terms. As the panel correctly noted, the Board has consistently applied this interpretation of Burns. See Henry M. Hald High School Ass'n, The Sisters

of St. Joseph, 213 NLRB 415 (1974); Arden's, 211 NLRB 501 (1974); Jerry's Finer Foods, 210 NLRB 52 (1974).

The panel failed to note, however, that the Board has consistently limited the Spruce Up exception to instances in which the offer of different employment terms is simultaneous or nearly simultaneous with the expression of intent to retain the predecessor's employees. When the offer of different terms is subsequent to the expression of intent to retain a majority, the Board has found the expression of intent controlling and required bargaining from that date. Both the Sixth and the Seventh Circuits have endorsed the Board's position in this respect. See Spitzer Akron, Inc., 219 NLRB 20 (1975), enforced, 540 F. 2d 841 (C.A. 6, 1976); The Denham Co., 206 NLRB 659 (1973), 218 NLRB 30 (1975); Bachrodt Chevrolet Co., 205 NLRB 784 (1973), enforced, 515 F. 2d 512 (C.A. 7, 1975) (table), cert. denied, 423 U.S. 927. ^{1/} See also Good Foods Mfg. & Processing Corp., 200 NLRB 623 (1972), enforced on other grounds, 492 F. 2d 1302 (C.A. 7, 1974).

^{1/} Bachrodt was originally decided before Burns, Bachrodt Chevrolet Co., 186 NLRB 1035 (1970), and the Seventh Circuit originally enforced the Board's order after Burns but without remanding for reconsideration by the Board. N.L.R.B. v. Bachrodt Chevrolet Co., 468 F. 2d 963 (C.A. 7, 1972), vacated and remanded, 411 U.S. 912 (1973) (for reconsideration by the Board in the light of Burns). In that opinion the Seventh Circuit held that the successor had violated the Act by making unilateral changes in employment after giving assurances to each employee that he would be rehired. The Court found "nothing to indicate that the employees were aware of the proposed changes [when they were given those assurances]." 468 F. 2d at 969.

4. The instant case is factually indistinguishable from Spitzer Akron, supra, in which the successor-employer informed the predecessor's employees that he "[wanted] every man to stay on the job" and only later instituted unilateral changes in employment terms. 540 F. 2d at 845. We submit that the panel's decision is incorrect to the extent it rejects the Spitzer Akron principle. As the Board has held, a simultaneous offer of employment only upon different terms casts doubt on whether the union will represent a majority of the successor's employees because it is not clear that a majority of the employees will accept employment on different terms. But when the successor's statement of intent is unaccompanied by such contradictory terms the inference that a majority will be retained is "perfectly clear." In the latter instance, the employees would have no reason to know that employment terms might be different and it is reasonable to assume that a majority will transfer to the successor. A contrary result effectively gives the employer blanket freedom to alter terms of employment and all but eliminates the "perfectly clear" test from the Burns decision.

5. In rejecting the Spitzer Akron cases, the panel relied upon this Court's decision in Brotherhood of Railway Clerks v. REA Express, Inc., 523 F. 2d 164 (C.A. 2, 1975), cert. denied, 423 U.S. 1017, and the alleged importance of the successor-employer's right to set initial terms and conditions of employment.

Neither ground justifies the panel's departure. In Railway Clerks the Court was called upon to decide whether the trustee in bankruptcy or the debtor-in-possession could disaffirm an executory collective bargaining agreement entered into by the debtor. The Court decided that the conflict between Sections 2 and 6 of the Railway Labor Act (RLA), 45 U.S.C. §§ 152 & 156, and Section 313(1) of the Bankruptcy Act, 11 U.S.C. § 713 (1), must be resolved in each case by weighing the interests protected by the RLA against the possibility that an onerous and burdensome collective agreement will thwart efforts to save the debtor. Treating the debtor-in-possession as a "juridical entity" distinct from the debtor before Chapter XI proceedings were commenced, the Court examined the doctrine developed by the Board under Burns to decide what changes successor-employers were allowed to make. It was in this context that the Court read Spruce Up to limit the Burns "perfectly clear" test "to those situations where the employees are led at the outset by the successor-employer to believe that they will have continuity of employment on pre-existing terms." 523 F. 2d at 171. A test that measures the justifiable reliance of employees in continued employment on identical terms may be appropriate when the successor is a debtor-in-possession and the Court is weighing the employees' interest against that of the creditors (and the employees) in the continued operation of the debtor's

^{2/} business. The test is not equally appropriate in situations other than bankruptcy when the question is simply whether it is clear that the successor intends to hire all of the predecessor's employees or at least enough to constitute a majority of the successor's work force.

Similarly, no matter how important the successor-employer's right to set initial terms of employment, the Supreme Court has held that it is limited by the important aim of federal labor legislation to prevent industrial strife through the process of collective bargaining. Once it becomes clear that a majority of the successor's employees are represented by the union, the labor policy becomes paramount and the successor must bargain. "The congressional policy manifest in the Act is to enable the parties to negotiate." N.L.R.B. v. Burns International Security Services, Inc., supra, 406 U.S. at 288.

^{2/} Unlike the instant case, no representation whatsoever was made to the employees in Railway Clerks that they would continue their employment. In fact the Chapter XI proceeding was widely publicized and the unions involved were given notice that changes would be necessary to avert the debtor's collapse. 523 F. 2d at 171-72. In Spitzer Akron the Sixth Circuit referred to Railway Clerks "[w]ithout commenting on [its] acceptance of [the Railway Express interpretation of Spruce Up]." 540 F. 2d at 845-46.

CONCLUSION

For the reasons stated, the Board respectfully requests the Court to grant rehearing, and suggests rehearing in banc. After rehearing, the Court should modify its opinion and enter an order directing recision of any detrimental unilateral changes in the terms and conditions of employment and restitution of any benefits lost because of their im-position.

JOHN D. BURGOYNE
Assistant General Counsel

PATRICK J. SZYMANSKI
Attorney

National Labor Relations Board.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

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